

IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
*Appellant,*  
vs.

BENJAMIN W. McNAIR  
*Appellee.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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HONORABLE JOHN C. BOWEN, *Judge*

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**BRIEF OF APPELLANT**

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J. CHARLES DENNIS  
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PAUL P. O'BRIEN,



No. 12121

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I. STATEMENT OF JURISDICTION

This is an appeal from the final decree of the United States District Court for the Western District of Washington, Northern Division, in Admiralty. The action is to recover disability benefits under the Sec-

ond Seamen's War Risk Policy. Jurisdiction of the District Court is founded on the provisions of Section 1128d, Title 46, U.S.C. and Sections 741-752, Title 46, U.S.C. (Suits in Admiralty Act). The action being cognizable in Admiralty, to-wit; under the Suits in Admiralty Act, an appeal may be taken from the final decree to this Court pursuant to the provisions of Sections 1291 and 1294, Title 28, U.S.C.

## II. STATEMENT OF THE CASE

### A. FACTS.

Libelant was a member of the crew of the SS WILLIAM SHARON, a merchant vessel operated for the United States of America by the War Shipping Administration. He was employed as a fireman and water-tender (Aps. 47). As a crew member, he was insured under the Second Seaman's War Risk Policy issued pursuant to the provisions of Sections 1128 to 1128h, Title 46, U.S.C. The terms of the policy in force and effect at the time of the injuries suffered by libelant are set forth in 1943 Supp., C.F.R., Title 46 — Shipping, Ch. III, War Shipping Administration, App. A, ps. 2127 et seq. and 1944 Supp., C.F.R., Title 46, — Shipping, Ch. III, War Shipping Administration, App. A, ps. 3774 - 3775. For the convenience of the Court, we have set forth in the appendix to

this brief, all of the effective and applicable provisions of the said policy.

On December 28, 1944, while the vessel was at Mindoro, Philippine Islands, she was attacked by Japanese suicide planes (Aps. 47). In the course of the action, libelant was struck in his right shoulder by a metal fragment from an exploding bomb. He was treated by a Navy doctor aboard a destroyer and at a shore installation. As a result of his injuries, his right arm was numb and he could not use it until sometime in March, 1945 (Aps. 48-49). He was repatriated to the United States on March 2, 1945, arriving at San Francisco, California. At this time, his arm had improved to the extent where he could dress himself (Aps. 65).

Following his return to the United States, he went to the home of his parents at Redmond, Washington until he went to sea again in August of 1945 (Aps. 51). From April 9, 1945 to May 22, 1945, he received out-patient treatment at the Marine Hospital at which time he was discharged as fit for duty (Aps. 67-72, Respondent's Exhibit A-3). Although discharged as fit for duty, his arm still gave him trouble and he did not engage in any work until August 13, 1945 when he shipped aboard the SS TOLOA as oiler and junior engineer (Aps. 83). He served



on the TOLOA in this capacity until February 28, 1946 (Aps. 84, 91). Thereafter he sailed as a member of the crew of the SS BARANOF from May 8, 1946 until May 23, 1946 (Aps. 85). He received satisfactory discharges from his services on the TOLOA and the BARANOFF (Aps. 85).

Libelant was examined by Dr. Mackay, a practicing neuro-surgeon, on August 15, 1947 (Aps. 26), just prior to the commencement of this action (Aps. 2). This examination disclosed that shrapnel, which was still imbedded in the libelant's shoulder, had caused some injury to the brachial plexus nerves of the right arm (Aps. 30), with a slight diminution of the strength of the entire upper extremity (Aps. 31). It was the doctor's opinion that at the time of his first examination, that while libelant had a 40% to 50% loss of use of the arm for heavy types of work, he could perform lighter jobs and use ordinary size tools (Aps. 38-40). Libelant's doctor further testified that the presence of shrapnel would not incapacitate libelant (Aps. 40).

Dr. Mackay examined libelant the day before the trial and at that time found the libelant to be fully recovered insofar as objective symptoms were concerned (Aps. 36, 43). It was his further opinion that libelant had suffered a 10 per cent permanent dis-



ability of the loss of use of his right arm as compared to an amputation of the arm at the shoulder (Aps. 34-35).

The District Court found that

“\* \* \* as a direct and proximate result of said injury libelant was continuously and totally disabled from performing any and every kind of duty pertaining to said occupation in which he was engaged at the time of said injury for a period of one year from and after March 2, 1945, the first date upon which libelant arrived in the continental United States following said injury.” (Aps. 11).

\* \* \*

And

“As a direct and proximate result of said injuries, libelant has been and is permanently and partially disabled to an extent equal to 10% of the amputation of his right arm at the shoulder.” (Aps. 11).

The Court concluded libelant was entitled to recover the sum of \$1,800 for said period of disability and the additional sum of \$325 for permanent partial disability and costs (Aps. 12). A decree awarding libelant recovery in the sum of \$2,125, together with costs in the sum of \$37.20 was thereupon entered. (Aps. 13).

## B. SPECIFICATIONS OF ERROR.

Appellant does not question that portion of the

decree awarding libelant a recovery for disability for the period from and after March 2, 1945 to August 13, 1945 or for a recovery for permanent partial disability equal to 10 per cent of the amputation of his right arm at the shoulder. Appellant does contend that the Court erred in finding that libelant was totally disabled from August 13, 1945 to March 2, 1946, within the meaning of the term "disability" as defined by the Second Seamen's War Risk Policy, to-wit:

" 'Disability' as that term is used in this Policy means incapacity because of injury proximately caused by the risks insured against herein which necessarily and continuously prevents the insured from performing any and every kind of duty pertaining to his occupation at the time of injury."

and in awarding libelant a recovery for said period.

### III. ARGUMENT

The burden of establishing disability as defined in the policy was on libelant. *United States v. Lawson* (C.C.A. 9) 50 F. (2d) 646; *United States v. McPhee* (C.C.A. 9) 31 F. (2d) 243. A mere scintilla of evidence is not sufficient. *United States v. Lawson*, *supra*.

In this case there is not even a scintilla of competent evidence in the record to show that, for the period August 13, 1945 to February 28, 1946, libelant

was disabled within the meaning of the term as defined in the policy. In fact the physical evidence, offered by libelant, affirmatively shows that during all of the time he was gainfully and steadily employed as a junior engineer and oiler aboard the SS TOLOA. He admitted that his services were satisfactory. The most that can be said is that during this period of employment at sea, the work he performed caused him some pain or inconvenience. But, this is not enough. *United States v. Martin* (C.C.A. 5) 54 F. (2d) 554, (Cert. Den. 286 U.S. 546); *United States v. McPhee*, *supra*.

There is no evidence that he worked when really unable and at the risk of endangering his life or health. On the contrary, the only reasonable inference that can be drawn from a consideration of all the evidence is that he did not suffer any ill effects from his employment. There is no evidence that his eventual recovery was in anywise impaired or retarded. The law is settled that in the absence of a showing that one worked at danger to himself the fact of his working may be such as conclusively to negative disability. *Lumbra v. United States*, 290 U.S. 551; *United States v. Diehl*, (C.C.A. 4), 62 F. (2d) 343; *United States v. Harth*, (C.C.A. 8), 61 F. (2d) 541.

In urging upon this Court the proposition that

the lower court erred in awarding libelant a recovery for the questioned period, we are mindful of the rule that though an appeal in admiralty is regarded as trial de novo, the trial court's findings and conclusions supported by competent evidence, will not be disregarded by the appellate court, and if based on conflicting evidence, will not be upset unless manifestly erroneous or clearly wrong, or there is a misapplication of some rule of law. *Lillig v. Union Sulphur Co.*, (C.C.A. 9) 87 F. (2d) 277; *The Mabel*, 61 F. (2d) 537. But as pointed out in our preceding argument there is no competent evidence or reasonable inference to be drawn from the evidence to support the trial court's findings and conclusions. Nor is there any conflict in the testimony regarding the physical fact of libelant's employment during the period in question. Clearly, the court's determination that libelant was disabled within the meaning of the provisions of the policy, is erroneous and wrong. *Crist v. United States War Shipping Administration*, 163 F. (2d) 145. Further, the trial court erred in the application of the law to the undisputed facts in finding and concluding libelant was disabled within the meaning of the term "disability". The contract of insurance provides that the term means incapacity

"which necessarily and continuously prevents the insured from performing any and every kind of

duty pertaining to his occupation at the time of injury”.

If the term as defined in the contract is construed reasonably and due regard is had to the circumstances of this case i.e. employment at sea, (*Lumbra v. United States*, supra) then it follows that the insured (libelant) was not necessarily and continuously prevented from performing any and every kind of duty pertaining to his occupation at the time of his injury.

#### IV. CONCLUSION

The decree entered herein should be modified and that part thereof allowing libelant a recovery on the insurance contract for disability payments for the period August 13, 1945 to March 2, 1946, should be vacated.

Respectfully submitted,

J. CHARLES DENNIS  
*United States Attorney*

FRANK PELLEGRINI  
*Assistant United States Attorney*

## APPENDIX

Effective and applicable provisions of Second  
Seamen's War Risk Policy.

### UNITED STATES OF AMERICA WAR SHIPPING ADMINISTRATION SECOND SEAMEN'S WAR RISK POLICY

Crew Life Disability, Loss of Effects and Detention

No. ....

Date .....

Total number of men insured for life and injury  
..... for \$..... each.

Total amount insured, life or injury \$.....

Rate.....% Premium \$.....

Total amount insured, personal effects \$.....

Rate.....% Premium \$.....

Total amount annual wages and Emergency wages  
\$.....

Rate.....% Premium \$.....

Total premium \$.....

In consideration of payment by.....  
of a premium of \$....., the War Shipping Ad-  
ministration does insure the Master, Officers and  
Crew, as hereinafter set forth, of the vessel called  
..... during the period described herein



commencing about ..... against loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention (including the occurrence of other situations hereinafter provided), from the perils and causes hereinafter stated, payable in case of claim in funds current in the United States in accordance with the following schedules and as hereinafter stated.

*Schedule 1. Loss of life.* Master, Officers and Crew, each ..... \$5,000.00.

The amount for which each person is covered by this Schedule is the Principal Sum.

*Schedule 2. Disability, including dismemberment and loss of function.* For disability proximately caused by the risks and perils insured against herein, and which arises within ninety days from the date of the happening of such risks and perils, and for dismemberment and loss of function caused by the risks and perils insured against herein, and which result from such a disability or otherwise occur within ninety days from the happening of such risks or perils, the Insurer will pay to the insured the benefits set forth in the Stipulations and Conditions.

*Schedule 3. Crew effects.* For loss of or damage to the personal effects of the Master, Officers or



Members of the Crew proximately caused by the risks and perils insured against herein, the Insurer will pay the amount set forth in the Stipulations and Conditions for the loss of or damage to said effects during the entire period of this Policy as hereinafter set forth, and for the loss of or damage to effects proximately caused by the risks and perils insured against herein, purchased or otherwise acquired during the policy period to replace effects lost or damaged by the risks and perils insured against herein, the Insured will pay not exceeding \$50.00 for each such loss or damage.

*Schedule 4. Detention and repatriation benefits.* For the detention of the Master, Officers or Members of the Crew during the period covered by this Policy, and under other situations hereinafter provided, the Insurer will pay benefits to the insured or for his or their account as set forth in the Stipulations and Conditions.

This Policy is made and accepted subject to the foregoing and to the Stipulations and Conditions on the following pages which are hereby specially referred to and made a part of this Policy.

In witness whereof, the War Shipping Administration has caused this Policy to be signed by the Administrator, but it shall not be valid unless counter-

signed by or on behalf of the Director of Wartime Insurance.

E. S. LAND,  
*Administrator.*

Countersigned at Washington, D. C., this.....  
day of ....., 194...

.....  
*Director of Wartime Insurance.*

## STIPULATIONS AND CONDITIONS

ARTICLE 1. *Persons insured.* The persons insured by this Policy are the Master, Officers and Crew of the vessel described on the face of this Policy. Except as to merchant seamen, membership in the vessel's gun crew shall not of itself constitute an individual a member of the crew of the vessel, as that phrase is used herein. Any person or persons insured under any other or similar policy including the Second Seamen's War Risk Policy, obtained or issued in compliance with the decisions of the Maritime War Emergency Board (issued by the United States Maritime Commission or the War Shipping Administration or otherwise), insuring against loss of life or disability (including dismemberment and loss of function) or loss of or damage to personal effects or de-

tention, including the occurrence of other situation hereinafter provided) shall not, to the extent of such prior coverage, be entitled to coverage under this Policy while such other insurance is in force and effect.

ARTICLE 2. *Additional insurance.* In the event that any person is employed as a Master or Officer or Member of the Crew of said vessel after the commencement of the voyage, the amount of the premium shall be increased proportionately: *Provided, however,* That the failure to pay such additional premium shall not affect the additional coverage.

ARTICE 3. *Risks and perils.* The insurance is for loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention (including the occurrence of other situations hereinafter provided) of the insured, directly and proximately caused by risks of war and warlike operations, including capture, seizure, destruction by men-of-war, sabotage, piracy, takings at sea, arrests, restraints and detainments, acts of kings, princes, and peoples in the prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion,

or insurrection, scuttling to prevent capture, aerial bombardment, or, attempts at, or measures taken in defense of, all of the foregoing acts, floating or stationary mines, torpedoes, whether derelict or not, collision caused by failure, in compliance with wartime regulations, of said vessel or any vessel with which she is in collision, to show the usual full peacetime navigation or anchorage lights, stranding caused by the absence of lights, buoys, or similar peacetime aids to navigation consequent upon wartime regulations, stranding caused by the failure of said vessel to employ a pilot in waters where a pilot would ordinarily be employed in peacetime, but in which the employment of a pilot is dispensed with in compliance with military, naval or other governmental orders, or with a view to avoiding imminent enemy attack (for the purposes of the foregoing, the failure to show lights, the absence of lights, buoys, etc., and the failure to employ a pilot shall be presumed to be the cause of the collision or stranding unless the contrary be proved, and stranding shall include sinking consequent upon stranding or contact with any part of the land), collision with another vessel in the same convoy or collision with any military or naval vessel, that is to say, a vessel manned by and under the control of mili-

tary or naval personnel and designed to be employed primarily in armed combat service, stranding, collision or contact with any external substance (including ice, but excluding water), as a result of deliberately placing the vessel in jeopardy, in compliance with military, naval or other governmental orders in order to avoid imminent enemy attack, or as an act or measure of war taken in the actual process of embarking or disembarking troops or loading or unloading material of war.

The fact that a vessel, or any vessel with which such vessel is in collision, is carrying troops or military or other supplies, or is proceeding to or from a war base, or is manned or operated by military or naval personnel, shall not alone be sufficient to include in this policy any claim which is not included by the foregoing terms of this article.

The insurance is also for loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention (including the occurrence of other situations hereinafter provided) of the insured, directly and proximately resulting from stranding, sinking, or break-up of the vessel, explosion or fire causing loss of or substantial damage to the vessel, or collision by the vessel or contact with any external substance (including ice, but



excluding water), irrespective of whether the same are caused by risks of war or warlike operations or by marine risks and perils.

The word "vessel" shall include any water-borne conveyance used to transport the insured to and from the vessel on which he is employed, and shall also include any air-borne conveyance used to transport the insured pursuant to instructions or permission of War Shipping Administration or its agents.

ARTICLE 4. *Period of coverage.* The period of coverage for each person covered hereunder is:

From the time such person signs the Articles or enters into a contract of employment for the voyage of the aforesaid vessel, or, if already on Articles for a series of voyages or period of time, from the inception of the aforesaid voyage (i.e., when the vessel is ready to begin the loading of cargo for the aforesaid voyage or to sail in ballast) or, if employed subsequent to the commencement of the voyage, from the time of such employment.

Until such person shall be returned to a place within the continental United States, excluding Alaska, including any period of capture or internment.

Unless sooner terminated by desertion, discharge, accepting employment on another vessel for a purpose

other than to be repatriated, or the refusal without good cause to return to the continental United States, excluding Alaska, from any place outside thereof, in any of which events the coverage under this Policy shall be at an end. (The term "discharge," as used in this paragraph, does not include instances in which the insured leaves the vessel for medical or hospital treatment or for other causes deemed good and sufficient in the opinion of the Administrator.)

ARTICLE 5. *Extension of period of coverage.*  
If the insured returns to the continental United States, excluding Alaska, on a vessel which touches or stays at a place or places within the continental United States, excluding Alaska, other than the place of termination of the voyage and the vessel thence proceeds to such place of termination, the period of coverage in respect to each person covered hereunder who continues to be on board such vessel is extended to the termination of the voyage.

\* \* \*

ARTICLE 12. *Disability and dismemberment.*

A. *Disability.* "Disability" as that term is used in this Policy means incapacity because of injury proximately caused by the risks insured against herein which necessarily and continuously prevents the insured from performing any and every kind of duty



pertaining to his occupation at the time of injury.

(1) If an insured suffers disability he shall be paid benefits at the rate of \$150 a month, *Provided, however,* That during any part of such period when the insured is hospitalized he shall be paid benefits at the rate of \$100 a month, beginning with his return to the continental United States, excluding Alaska, until the Administrator determines that the disability has ceased or until a total of \$5,000 is paid, whichever first occurs.

(2) If the Administrator determines at any time during the period such monthly benefits are payable that the insured has received maximum medical treatment for such disability and that such disability is, therefore, permanent in quality (loss of both hands, or both arms, or both feet, or both legs, or both eyes or combination of any two thereof, will be conclusively presumed by the Administrator to constitute a disability permanent in quality), he shall notify the insured of such facts and the insured shall have the option of

(a) continuing to receive such monthly benefits at the rate of \$150 a month or \$100 a month, as the case may be, until the aggregate of all the monthly benefits paid to him both before and after such determination total \$5,000, or

(b) receiving in a lump payment the sum of \$5,000, less the total of the monthly benefits paid to him prior to such determination.

(3) In the event the insured elects after such determination to accept payments for such disability under subdivision (2) (a) hereof and if when the total of \$5,000 has been paid him as therein provided, the insured claims in writing, and establishes to the satisfaction of the Administrator, that because of the same injury he is incapable of performing, for remuneration or profit, any work or engaging in any business or occupation, then he shall be paid further benefits at the rate of \$150 a month or \$100 a month, as the case may be, until the Administrator determines such incapacity has ceased or until a total of \$2,500 is paid, whichever first occurs.

B. *Dismemberment, including loss of function.* If the Administrator determines that the insured, as a proximate result of the risks insured against herein, has suffered a dismemberment or loss of function of the type set forth below, not however, amounting to disability which the Administrator determines to be permanent in quality, the Insurer will pay to the insured additional benefits measured by the following percentages of the Principal Sum. Such benefits shall be in addition to the benefits paid under subdivision

(1), paragraph A hereof, but the aggregate of such benefits for disability, dismemberment, and loss of function shall not exceed the Principal Sum.

(1) *Member lost:* *Per centum*

(a) Arm .....	65
(b) Leg .....	65
(c) Hand .....	50
(d) Foot .....	50
(e) Eye .....	45
(f) Thumb .....	15
(g) First finger .....	10
(h) Great toe .....	9
(i) Second finger .....	5
(j) Third finger .....	5
(k) Toe other than great toe.....	2½
(l) Fourth finger .....	2½

(m) Loss of hearing: for complete loss of hearing of one ear, 12½%; for the complete loss of hearing of both ears, 50%.

(n) Phalanages: for loss of more than one phalange of a digit, the same as the loss of the entire digit; for loss of the first phalange one-half the loss of the entire digit.

(o) Amputated arm or leg: for an arm or leg, if amputated at or above the elbow or the knee, the same as for the loss of the arm or leg: if amputated

between the elbow and the wrist or the knee and the ankle, the same as for the loss of a hand or foot.

(p) Binocular vision or per centum of vision: for loss of binocular vision or for eighty per centum or more of the vision of an eye shall be the same as for loss of the eye.

(q) Two or more digits: for loss or loss of use of two or more digits, or one or more phalanges of two or more digits, or a hand or foot, may be proportioned to the loss of use of the hand or foot occasioned thereby but shall not exceed the payment for loss of a hand or foot.

(r) Total loss of use: for permanent total loss of use of a member shall be the same as for loss of the member.

(s) Partial loss or loss of use: payment for permanent partial loss or loss of use of a member may be for proportionate loss of the member or loss of use of the member.

(t) Disfigurement: proper and equitable payment for serious facial or head disfigurement, not to exceed 50%.

(u) Total or partial loss or loss of use of more than one member or parts of members. In any case in which there shall be a loss or loss of use of more

than one member or parts of more than one member set forth in subdivision (a) to (t) both inclusive, hereof, but not amounting to permanent total disability, payment shall be made for the loss or loss of use of each such member or part thereof, however, not exceeding the Principal Sum, and except that where the injury affects only two or more digits of the same hand or foot, subdivision (q) hereof shall apply.

(2) The amount determined by the Administrator to be due the insured for dismemberment or loss of function shall

(a) if \$750 or less, be paid the insured in a lump sum as soon as practicable.

(b) if more than \$750 be paid, at the option of the insured, in a lump sum or in monthly installments of \$150 a month or \$100 a month, as the case may be, beginning with the month next succeeding the last monthly payment made for disability pursuant to the provisions of subdivision (1), paragraph A hereof, or as soon thereafter as is practicable. The insured shall notify the Administrator in writing of the desired method of payment immediately upon receipt of the Administrator's determination that the insured is entitled to payment for dismemberment or loss of function under this paragraph. Should the Adminis-

trator not receive such written notice within thirty days, it shall be conclusively presumed that the insured desires payment in a lump sum and the Insurer will act accordingly.

(3) If the insured elects under subdivision (2) (b) hereof to accept payment for dismemberment or loss of function in monthly installments, the number of installments due shall be increased in number by 10%, but in no event shall the increase be less than one installment of \$150 a month or \$100 a month, as the case may be.

C. *Injury increasing disability.* The Administrator in determining if disability, dismemberment or loss of function exists, or if found to exist, the quality thereof, will not take previous disabilities, dismemberments or losses of function into account. If, however, such previous condition was insured under the Second Seamen's War Risk Policy, the insured shall receive with respect to the two claims an aggregate sum not less than he would have been entitled to under either subdivision (2) and (3) of paragraph A or paragraph B hereof, had the injuries causing both disabilities been received at the same time.

D. Disability shall not include incapacity directly resulting from bodily or mental infirmity or disease of any kind. Nor shall benefits be paid for dis-



memberment or loss of function directly resulting from bodily or mental infirmity or disease of any kind.

E. If the insured elects after a determination by the Administrator that he is entitled to benefits under either subdivision (2) paragraph A or paragraph B hereof to accept payments for such disability, dismemberment, or loss of function, as the case may be, in installments, and if the insured dies from a cause not insured against herein before he has received the last installment, the remainder which he would have received under such subdivision had he survived shall be paid to the person or persons who would have received his life insurance hereunder, subject, however, to all the conditions, stipulations, and provisions contained in this Policy governing the disposition and payment of the insurance for loss of life.

The right of the insured to payment of the benefits provided for herein shall be conditioned upon his or her being alive to receive payment, and benefits shall not be paid to the heirs, executors, or administrators of the insured, or of any other person.



